

JUSTIN X. WANG (CSB #166183)
PEGGY A. SHIH (CSB #197545)
BAUGHMAN & WANG
111 Pine Street, Suite 1350
San Francisco, California 94111
Telephone: (415) 576-9923
Facsimile: (415) 576-9929

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

PING JIANG,

Plaintiff

V.

MICHAEL CHERTOFF, Secretary;
Department of Homeland Security;
ROBERT S. MUELLER, Director of the
Federal Bureau of Investigation,

Defendants.

Case No.: C 07-3909 CRB

**PLANTIFF'S OPPOSITION TO
DEFENDANTS' EX PARTE
MOTION PURSUANT TO
FED. R. CIV. P. 56(f)**

District Judge: Honorable Charles R. Breyer

I. INTRODUCTION

On August 2, 2007, Plaintiff Ping Jiang (“Plaintiff”) served the United States Attorney’s Office a Complaint for Writ in the Nature of Mandamus. On September 7, 2007, Plaintiff filed a Motion for Summary Judgment (“Plaintiff’s Motion”). Without any prior notice to the Plaintiff, on September 10, 2007, Defendants filed an ex parte motion pursuant to Fed. R. Civ. P. 56(f) (“Defendants’ Motion”). Plaintiff hereby opposes Defendants’ Motion, and requests that the Court go forward on Plaintiff’s Motion hearing, scheduled for October 12, 2007.

I. ANALYSIS

Ex parte motions¹ are granted only on rare occasions and after a showing of good cause.

In re Intermagnetics America, Inc., 101 BR 191, 192-193 (C.D. Cal. 1989). An ex parte

¹ In the Northern District, an ex parte motion (defined as a motion filed without notice to the opposing party) “must include a citation to the statute, rule or order which permits the use of an ex parte motion to obtain the relief sought.” Civ. L.R. 7-10.

1 application must show why the moving party should be allowed to “go to the head of the line in
2 front of all other litigations and receive special treatment.” *Mission Power Engineering Co. v.*
3 *Continental Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal 1995). Ex parte proceedings have been
4 identified as posing a great threat to the adversary system, which allows both sides to have their
5 say, therefore promoting accuracy, fairness, and consistency. Although adversary proceedings
6 will not eliminate all error, unfairness, or inconsistency, the risk of such dangers increase when
7 one side proceeds ex parte. *In re Intermangnetics America, Inc.* 101 BR at 192.

8 The Defendants have failed to show good cause. First, Defendants have failed to indicate
9 how it will be irreparably prejudiced if Plaintiff’s Motion, as scheduled for October, is heard. In
10 addition, Defendants have failed to indicate that they are without fault in creating the crisis that
11 requires ex parte relief. *Id.*

12 Defendants’ Motion pursuant to Fed. R. Civ. P. 56(f) should also be denied because
13 Plaintiff’s Motion was issued well within the statutory allowance, and Defendants have sufficient
14 opportunity to investigate the claims raised in Plaintiff’s Complaint.

15 Plaintiff’s Motion was not premature. Federal Rule of Civil Procedure 56(a) permits a
16 party asserting a claim to move for summary judgment any time after the expiration of 20 days
17 from the commencement of the action. Plaintiff’s Motion was initiated well after the 20-day
18 holding period.² Defendants have sufficient opportunity to investigate the claim raised in
19 Plaintiff’s Complaint.

20 Defendants reliance on Federal Rule of Civil Procedure 56(f) is procedurally deficient.
21 The rule provides that the Court may refuse the application for judgment or may order a
22 continuance to permit discovery where “it appears from the affidavits of a party opposing the
23 motion that the party cannot for reasons stated present by affidavit facts essential to justify the
24 party’s opposition.” Fed. R. Civ. P. 56(f). The Defendants were required to show the following:
25 1) facts establishing a likelihood that controverting evidence may exist as a material fact; 2) the
26 specific reasons why such evidence cannot be presented at the present time; and 3) the steps or

27
28 ² Commencement of the action occurred on July 30, 2007. Plaintiff’s Motion was filed
on September 7, 2007.

1 procedures which the opposing party intended to utilize to obtains such evidence.
 2 *Aristocrat Technologies Australia PTY Ltd. v. International Game*, 491 F. Supp. 2d 916, 935
 3 (N.D. Cal. 2007). Furthermore, Defendants must explain how additional time will enable them
 4 to rebut Plaintiff's allegations of no genuine issue of material fact. *Id.* Defendants' affidavit
 5 fails to make the necessary showing. In fact, this case does not implicate a complex set of facts
 6 requiring additional discovery. The facts are quite simple. Plaintiff filed an adjustment of status
 7 application on January 18, 2005. Plaintiff Ping Jiang Form I-140 was approved on May 26,
 8 2006. However, while Plaintiffs have complied with the requirements for eligibility under the
 9 statute, the I-485 application has remained pending with no further action for over two years and
 10 two months.

11 Mandamus relief in adjustment of status cases, such as this one, can be granted solely on
 12 the length of the delay. *Aboushaban v. Mueller*, No. C 06-1280 BZ, 2006 WL 3041086, at *2
 13 (N.D. Cal. Oct. 24, 2006); *Singh v. Still*, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2007). In a case
 14 before this district, Judge Alsup found that a two year delay to be unreasonable as a matter of
 15 law. *Gelfer v. Chertoff*, 2007 WL 902383 at *2 (N.D. Cal. March 22, 2007). Plaintiff filed his I-
 16 485 application over two years and nine months ago. Defendants have a duty to complete the
 17 adjudication of Plaintiff's adjustment of status application within a reasonable time under the
 18 Mandamus Act and the and the Administrative Procedure Act. Not only is the evidence within
 19 the Defendants control, but their motion is simply a delaying tactic that will ultimately reveal
 20 incontrovertible facts.

21 III. Conclusion

22 For the reasons set forth herein, Plaintiff respectfully requests that the Court deny the
 23 Defendants' Motion and go forward with Plaintiff's Motion hearing, as scheduled, for October
 24 12, 2007.

25 Dated: September 13, 2007

Respectfully submitted,

26 _____
 27 /s/

28 Justin. X. Wang
 Attorney for Plaintiff